

1-1-1991

The Overseas Private Investment Corporation and Worker Rights: The Loss of Role Models for Employment Standards in the Foreign Workplace

James M. Zimmerman

Follow this and additional works at: https://repository.uchastings.edu/hastings_international_comparative_law_review

 Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

Recommended Citation

James M. Zimmerman, *The Overseas Private Investment Corporation and Worker Rights: The Loss of Role Models for Employment Standards in the Foreign Workplace*, 14 HASTINGS INT'L & COMP. L. Rev. 603 (1991).
Available at: https://repository.uchastings.edu/hastings_international_comparative_law_review/vol14/iss3/2

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings International and Comparative Law Review by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

The Overseas Private Investment Corporation and Worker Rights: The Loss of Role Models for Employment Standards in the Foreign Workplace

By JAMES M. ZIMMERMAN*

I. INTRODUCTION

The Overseas Private Investment Corporation (OPIC) is prohibited from providing U.S. investors with political risk insurance and financial assistance in countries that fail to take steps to adopt and implement internationally recognized worker rights. This Article reviews the history of OPIC, describes the recent amendments to OPIC authorizing legislation setting forth the worker rights requirements, and discusses the impact that these revisions may have on investors. This Article concludes that Congress should create an exception for investors who voluntarily take steps to implement worker rights in the foreign workplace, notwithstanding the practices of foreign governments found to be in violation of internationally recognized worker rights.

II. HISTORICAL OVERVIEW

After World War II, the United States used direct foreign aid to encourage economic development in lesser developed and developing countries. The U.S. postwar geopolitical strategy recognized economic development as a means of thwarting political and social instability, encouraging strong economies, and preventing the spread of communism in lesser developed and developing countries.¹ At the same time, the United States placed significant emphasis on the utilization of private

* B.A., 1982, University of California, Irvine; M.B.A., 1984, University of California, Irvine; J.D., 1987, University of San Diego. The author is the Senior Associate Attorney with the firm Sparber, Ferguson, Naumann, Ponder & Ryan, San Diego, California.

1. See SENATE COMM. ON FOREIGN RELATIONS, THE OVERSEAS PRIVATE INVESTMENT CORPORATIONS AMENDMENTS ACT, S. REP. NO. 676, 93d Cong., 2d Sess. 41 (1973), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 872; D. HAENDEL, FOREIGN INVESTMENTS AND THE MANAGEMENT OF POLITICAL RISK 33-36 (1979).

investment to foster economic development overseas as a supplement to U.S. direct foreign aid.

Under the Economic Cooperation Act of 1948,² the United States provided investment insurance for private overseas investment. Initially, coverage was limited to inconvertibility of foreign currency, a major impediment to overseas investment after World War II.³ In 1952 the United States provided coverage for expropriation of property, and in 1962 protection was extended to losses due to war, insurrection, and revolution.⁴ Prior to 1955 insurance programs emphasized the rebuilding of war-ravaged Europe and Japan, but during the late 1950s and early 1960s, the emphasis shifted to lesser developed and developing countries.⁵ In 1961 the Agency for International Development (AID) was charged with administering U.S. overseas insurance programs and offered insurance to private U.S. investors in order to encourage overseas private investment to stimulate economic development in lesser developed countries.⁶

In 1969 Congress enacted the Foreign Assistance Act,⁷ thereby creating the Overseas Private Investment Corporation (OPIC). Congress gave OPIC responsibility for AID's insurance programs and other investment incentive programs.⁸ OPIC is an autonomous U.S. government corporation under the policy guidance of the Secretary of State.⁹ Congress intended OPIC to operate primarily as a development agency; technically, OPIC is part of the State Department's International Cooperation Development Agency.¹⁰

2. Economic Cooperation Act of 1948, ch. 169, 62 Stat. 137. This statute put the Marshall Plan into effect. The Marshall Plan was an economic recovery and political stability scheme advanced by Secretary of State George C. Marshall in 1947 to assist the rebuilding of Western European countries after World War II.

3. D. HAENDEL, *supra* note 1, at 33.

4. *Id.* at 9.

5. *Id.*

6. *Id.* at 9, 33.

7. Foreign Assistance Act of 1961, Pub. L. No 87-195, § 101, 75 Stat. 424 (codified as amended at 22 U.S.C. §§ 2151-2443 (1990)).

8. R. JORDAN, OVERSEAS PRIVATE INVESTMENT CORPORATION 1 (1983); Note, *Encouraging Investment in LDC's: The United States Investment Guaranty Program*, 8 BROOKLYN J. INT'L L. 365 (1982); Note, *International Trade Reauthorization for the Overseas Private Investment Corporation*, 12 GA. J. INT'L & COMP. L. 251 (1982); D. HAENDEL, *supra* note 1, at 33-69; Zimmerman, *Political Risk Assessment and the Expanding Role of the International Practitioner*, 11 SUFFOLK TRANSNAT'L J.L. 1, 20 (1987).

9. 22 U.S.C. § 2191 (1990).

10. OPIC's role as a development agency has become increasingly important in recent years as U.S. foreign aid continues to decline and as the debt crisis of developing and lesser-developed countries remains a problem for the international financial community. *Reauthorization of the Overseas Private Investment Corporation: Hearings on H.R. 3797 Before*

OPIC insures overseas projects against loss due to political risks such as war, revolution, insurrection, civil strife, expropriation, abrogation of contractual rights, and inconvertibility of currency.¹¹ OPIC also provides a variety of pre-investment services and operates a project finance program acting as a lender or guarantor of funds invested overseas.¹² OPIC-insured investments are backed by the "full faith and credit of the United States."¹³ OPIC's purpose is "[t]o mobilize and facilitate the participation of United States private capital and skills in the economic and social development of less developed friendly countries and areas, thereby complementing the development assistance objectives of the United States."¹⁴ The goal of OPIC's programs, therefore, is to reduce the risk of overseas investment and make such investments more attractive.

OPIC provides coverage for new investments if the investment is approved by the host government, benefits the socioeconomic development of the host country, and does not conflict with U.S. development and economic objectives.¹⁵ OPIC must give preferential treatment to a country with a per capita annual income of less than 984 dollars (measured in 1986 U.S. dollars) and must restrict its activities in countries with per capita income of 4269 dollars or more (measured in 1986 U.S. dollars), other than beneficiary countries under section 212 of the Caribbean Basin Economic Recovery Act.¹⁶

OPIC-assisted projects have been acknowledged as "an effective complement and supplement to U.S. development assistance objec-

the Subcomm. on Int'l Econ. Pol'y & Trade of the House Comm. on Foreign Affairs, 100th Cong., 2d Sess. 9-10 (1988) (statement of Craig A. Nalen, President and Chief Executive Officer of OPIC) [hereinafter *Hearings on H.R. 3797*].

11. 22 U.S.C. § 2194(a)(1) (1990). Inconvertibility coverage protects against the inability to convert foreign currency into U.S. dollars. Though coverage extends to discriminatory exchange rates, no coverage is afforded for losses as a result of devaluation of currency. Expropriation coverage protects investors against loss due to government confiscation and nationalization. *Id.* §§ 2194 (a)(1)(B), 2198(b). Coverage against civil strife protects investors from all politically motivated acts of violence, including terrorism, and sabotage, of a lesser degree than war, revolution, or insurrection. *Id.* §§ 2194(a)(1)(C), 2194(a)(4). OPIC also provides coverage for loss due to business interruption caused by expropriation, war, revolution, and civil strife. *Id.* at § 2194(a)(1)(D).

12. *Id.* § 2194.

13. Investment guarantees issued by OPIC constitute general obligations of the United States and are backed by its full faith and credit. 42 Op. Att'y Gen. 455 (1972).

14. 22 U.S.C. § 2191 (1990) (Congressional Statement of Purpose).

15. *Id.*

16. See Overseas Private Investment Corporation Amendments Act of 1988, Oct. 1, 1988, as part of the FY 1989 Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 100-461, 102 Stat. 2268-36 (1988) (codified at 22 U.S.C. § 2191(2) (1990)).

tives."¹⁷ For example, 53 percent of OPIC projects during the fiscal years 1985-87 were located in countries having per capita incomes of 896 dollars or less (measured in 1983 U.S. dollars).¹⁸ Sixty-two percent of OPIC projects for fiscal year 1987, or 102 of 165 projects, were located in lesser developed countries, while only 2 percent of OPIC projects were located in developing countries with per capita income greater than 3887 dollars.¹⁹ OPIC projects, in 61 different countries, are expected to produce 2.6 billion dollars in additional foreign exchange and 50,000 jobs in the host countries by their fifth year in operation.²⁰

In response to congressional development concerns, OPIC has taken particular interest in the Caribbean Basin region and in countries in sub-Saharan Africa.²¹ During the fiscal years 1985 through 1987, OPIC provided assistance to 101 projects in the Caribbean Basin, representing a 743 million dollar investment of U.S. dollars to this beleaguered region.²² Similarly, during the same period, OPIC assisted 20 projects in sub-Saharan Africa for a total investment of 101 million dollars.²³

Congress also acknowledges that OPIC-assisted programs are a means of spurring the domestic economy through an increased demand for U.S. goods vis-à-vis sale of such goods to foreign affiliates of domestic companies.²⁴ OPIC estimates that the 446 projects insured or financed during the fiscal years 1985-87 provided 4.2 billion dollars in trade benefits to the United States during the first 5 years of operation and are expected to generate more than 47,000 person-years of U.S. employment over a 5 year period.²⁵

III. RUNAWAY OPERATIONS AND OPIC EMPLOYMENT OBJECTIVES

OPIC has been accused of being "a significant inducement for capital flight and overseas production by U.S. industries"²⁶ to countries with

17. HOUSE COMM. ON FOREIGN AFFAIRS, REPORT TO ACCOMPANY H.R. 3166, H.R. REP. NO. 285, 99th Cong., 1st Sess. 3, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 2572, 2573 [hereinafter H.R. REP. NO. 285].

18. *Hearings on H.R. 3797, supra* note 10, at 11.

19. *Id.*

20. *Id.* at 10.

21. *Id.* at 11-12.

22. *Id.*

23. *Id.*

24. H.R. REP. NO. 285, *supra* note 17, at 3-4, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 2572, 2573.

25. *Hearings on H.R. 3797, supra* note 10, at 14.

26. H.R. REP. NO. 285, *supra* note 17, at 6, *reprinted in* 1985 U.S. CODE CONG. & AD-

exploitative working conditions.²⁷ Condemning OPIC programs, the Executive Council of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) passed a resolution which provides:

OPIC-insured corporations, which replaced in whole or in part, their operations in the U.S. by removing them to low wage areas, are not helping to raise wages and improve living conditions of the working people in these impoverished countries. These corporations, who profiteer at the expense of badly underpaid workers in other lands, have caused the loss of U.S. jobs, the undercutting of American living standards and the flooding of U.S. markets with goods made by U.S. companies in other lands.²⁸

The AFL-CIO believes that OPIC programs are a form of government assistance to certain large U.S. transnational firms to locate in relatively affluent countries that directly compete with firms that choose to remain in the United States.

To quell the misuse of OPIC programs by runaway industries, OPIC is required to decline support of any investment if OPIC determines the investment is likely to cause a significant reduction in the number of employees in the United States.²⁹ Similarly, OPIC must decline to assist an investment if it is determined that such investment is likely to cause the investor to reduce significantly the number of its employees in the United States because it is replacing U.S. production with production from an overseas investment which involves substantially the same product for substantially the same market as the U.S. operation.³⁰ Furthermore, OPIC is required "to further to the greatest degree possible, in a manner consistent with its goals, the balance-of-payments and employment objectives of the United States."³¹

Prior to insuring or financing a particular venture, OPIC reviews and analyzes each proposed investment individually to determine whether it will have significant adverse effects.³² This screening process, handled by the Economic Impact Analysis Unit in OPIC's Office of De-

MIN. NEWS 2572, 2577. *Hearings on H.R. 3797, supra* note 10, at 131-33 (statement of William J. Cunningham, Dep't of Legislation, AFL-CIO.)

27. *Id.*

28. *Reauthorization of the Overseas Private Investment Corporation: Hearing Before the Subcomm. on Foreign Econ. Pol'y of the Comm. on Foreign Affairs*, 93d Cong., 2d Sess. 215 (1974) (statement of Andrew J. Biemiller, Dep't of Legislation, AFL-CIO; statement by the AFL-CIO Executive Council).

29. 22 U.S.C. § 2191(3)(l) (1990).

30. *Id.* § 2191(3)(k)(l).

31. *Id.* § 2191(3)(h).

32. *Hearings on H.R. 3797, supra* note 10, at 16-17.

velopment, is undertaken in consultation with the Department of Commerce, the Department of Labor, the Office of the United States Trade Representative, and the International Trade Commission, as well as labor and industry organizations.³³ OPIC analyzes the probable impact of the proposed project on the investor and the industry sector involved, and in particular OPIC addresses the following factors:

- (1) the level of U.S. employment in that particular sector;
- (2) the sensitivity of the relevant sector to imports;
- (3) the competitiveness of U.S. exports in foreign markets; and
- (4) the imposition of trade-related performance requirements by the host government.³⁴

During the time period from 1974 through fiscal year 1987, OPIC had refused to provide insurance coverage or financing for 139 proposed projects on the grounds that the projects appeared likely to have a significant adverse impact on the U.S. economy or employment.³⁵ An indeterminate number of other projects were informally discouraged prior to the application process because preliminary indications demonstrated that the investor's proposal was likely to have a significant detrimental effect on U.S. employment.³⁶ These cases usually involved operations in historically sensitive sectors of industry.³⁷

In 1985 as part of OPIC's reauthorization legislation, Congress directed OPIC to provide in its annual report to Congress its analysis of the actual effects on employment in the United States of each OPIC project.³⁸ OPIC's 1987 report, prepared by an independent accounting firm, found that "OPIC-assisted projects have significant positive impacts on domestic U.S. employment."³⁹ This report also found that none of the OPIC projects were "runaway plants."⁴⁰

During the same time period, the U.S. General Accounting Office (GAO) prepared a study of OPIC projects and found that:

... [s]ome OPIC-assisted projects have direct negative impacts on U.S. employment. OPIC's methodology for computing the economic impact on the United States of the projects it assists obscures the direct

33. *Id.*

34. *Id.*

35. *Id.* at 17.

36. *Id.*

37. *Reauthorization of the Overseas Private Investment Corporation: Hearings on H.R. 3166 Before the Subcomm. on Int'l Econ. Pol'y & Trade of the Comm. on Foreign Affairs*, 99th Cong., 1st Sess. 619 (1985) [hereinafter *Hearings on H.R. 3166*].

38. *Id.* at 541. See 22 U.S.C. § 2200a(b)(1)-(2) (1990).

39. *Hearings on H.R. 3797*, *supra* note 10, at 17, 69-73.

40. *Id.* at 73.

effects of these projects . . . and results in overly optimistic reports to the Congress regarding the magnitude of economic benefits to the United States⁴¹

The GAO report criticized OPIC's methodology in monitoring the effects of OPIC's projects on U.S. employment, and in particular, the GAO found that OPIC's procedures for screening and monitoring projects were inadequate.⁴² OPIC pledged to improve its data gathering and analytical procedures to ensure that OPIC's assessment process is more objective and accurate.⁴³

IV. OPIC-ASSISTED PROJECTS AND OVERSEAS WORKER RIGHTS

A. The Worker Rights Provision

To ensure that OPIC furthers U.S. development assistance goals and fosters the objectives of stimulating the domestic economy and avoiding negative effects on U.S. employment, Congress passed the Overseas Private Investment Corporation Amendments Act of 1985, requiring OPIC to withhold investment insurance to projects in countries that fail to take steps to adopt laws that extend internationally recognized worker rights to its employment force.⁴⁴ The 1985 OPIC amendments added a new section to the Foreign Assistance Act of 1961.⁴⁵ The new section (Limitation on OPIC Activities) provides:

The Corporation may insure, reinsure, guarantee, or finance a project only if the country in which the project is to be undertaken is taking steps to adopt and implement laws that extend internationally recognized worker rights, as defined in section 502(a)(4) of the Trade Act of 1974 (19 U.S.C. § 2462(a)(4)), to workers in that country (including any designated zone in that country).⁴⁶

Under this section, internationally recognized worker rights are

41. *Id.* at 132-33.

42. *Id.* at 28, 133.

43. *Id.* at 28.

44. Overseas Private Investment Corporation Amendments Act of 1985, Pub. L. No. 99-204, § 5, 99 Stat. 1669, 1670-71 (codified at 22 U.S.C. § 2191a(a)(1) (1985)).

45. Foreign Assistance Act of 1961, Pub. L. No 87-195, § 101, 75 Stat. 424 (codified as amended at 22 U.S.C. §§ 2151-2443 (1990)).

46. 22 U.S.C. § 2191a(a)(1) (1990). If the President determines that OPIC's activities are in the national economic interest of the United States, notwithstanding the existence of substandard employment conditions, a waiver of the workers rights limitation may be granted. In such a case, OPIC is required to report to Congress its reasons for the waiver. *Id.* § 2191a(a)(3).

those defined in the Trade Act of 1974,⁴⁷ which include the right of association; the right to organize and bargain collectively; a prohibition on the use of any form of forced or compulsory labor; a minimum age for the employment of children; and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.⁴⁸ Congress believed that in furtherance of OPIC's development goals "nothing can more encourage a developing country than to provide its workers with these basic kinds of rights."⁴⁹

Though not defined in the 1985 OPIC amendments, the legislative history explains the criteria by which OPIC is to determine whether a country "is taking steps to adopt and implement laws." The original version of the worker rights provision was mandatory and required that "[t]he country in which the project is to be undertaken *has* adopted and implemented laws that extend internationally recognized workers' rights."⁵⁰ Under the OPIC amendments, OPIC's objective is to analyze

47. 19 U.S.C. § 2462(a)(4) (West Supp. 1990).

48. *Id.*

49. *Hearings on H.R. 3166, supra* note 37, at 489. Congress believed that the recognition of basic worker rights would benefit OPIC-assisted projects by decreasing political risk. To this effect, the Committee on Foreign Affairs noted:

respect for the internationally recognized rights of workers is vital to insuring that the broadest sectors of the population within host countries benefit from OPIC programs. The denial of internationally recognized workers' rights in developing countries tends to perpetuate poverty, to limit the benefits of economic development and growth to narrow privileged elites, and to increase political, social, and economic instability.

Such instability can, in turn, pose a threat to OPIC's financial well-being. By requiring visible progress toward adoption and implementation of internationally recognized workers' rights in host countries, OPIC can encourage development, decrease political risk, and improve its own financial stability.

H.R. REP. NO. 285, *supra* note 17, at 6-7, reprinted in 1985 U.S. CODE CONG. & ADMIN. NEWS 2572, 2577. Clearly, the absence of fundamental employment standards is a source of social discontent and disorder. History is replete with examples of workers revolting against governing powers, property owners, and the bourgeois as a result of economic deprivation and hardship. However, political risk is more than losses that result from governmental instability. Political risk is the uncertainty of the political environment and its effect on the international investor. Political risk exists when unanticipated discontinuities occur in the environment resulting from politically related sources. Such risk may result from extragovernmental political activities including riots, insurrection, and terrorism; national aspirations to increase control over the economy and natural resources of a nation; racial and religious disputes; ineffective law enforcement; international boycotts; as well as from economic hardship. Certainly, a stagnant economy has political as well as economic content. Relative deprivation, or the gap between expectations and perceptions of capabilities, is a source of political instability but it is not the sole source. See Kobrin, *Political Risk: A Review and Reconsideration*, 10 J. INT'L BUS. STUD. 67 (1979); Brewer, *Political Sources of Risk in the International Money Markets: Conceptual, Methodological, and Interpretive Refinements*, 14 J. INT'L BUS. STUD. 161 (1983).

50. *Hearings on H.R. 3166, supra* note 37, at 523-26 (emphasis added).

current conditions relative to past conditions.⁵¹ If OPIC cannot find that a particular country is taking steps to adopt and implement worker rights, then OPIC cannot assist projects in that country.⁵²

The House of Representatives Committee on Foreign Affairs noted that a country's International Labor Organization (ILO) activities and the enactment of labor legislation should be considered "taking steps" under the OPIC amendment.⁵³ The report states:

While there is no explicit interpretation of 'taking steps to,' it is the intent of the committee that a country should be considered to be 'taking steps to adopt and implement laws that extend internationally recognized workers' rights if: (1) it is a member of the International Labor Organization (ILO) and signator of the Constitution of the International Labor Organization; (2) its laws in fact conform to one or more of the rights listed in section 502(a)(4) of the Trade Act of 1974; and (3) [it] continues to make progress to implement internationally recognized worker rights.⁵⁴

At the same time, the Congressional Conference Committee disagreed with ILO activity and the mere pronouncement of labor laws as determinants of a country's progress to implement and adopt worker rights legislation.⁵⁵ The conferees noted that:

'[T]aking steps to adopt and implement laws' to extend internationally recognized worker rights is *open* to some interpretation The conferees stress that the mere ratification of International Labor Organization conventions which deal with the specific rights enumerated in this section is not sufficient evidence that a country is 'taking steps to adopt and implement internationally recognized worker rights,' if that country fails to take measures domestically to meet its obligations pursuant to these conventions.⁵⁶

The conferees thus emphasized that mere ratification of international conventions is insufficient; domestic measures must also be taken to fulfill the standards under the 1985 OPIC amendments.

Congress also recognized that employment standards in many developing countries differ considerably from U.S. standards, as well as inter-

51. H.R. REP. NO. 285, *supra* note 17, at 6, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 2572, 2577.

52. *Id.*

53. *Id.*

54. *Id.*

55. CONFERENCE REPORT: OVERSEAS PRIVATE INVESTMENT CORPORATION AMENDMENTS ACT OF 1985, H.R. CONF. REP. NO. 428, 99th Cong., 1st Sess. 3, *reprinted in* 1985 U.S. CODE CONG. AND ADMIN. NEWS 2583, 2584-85 [hereinafter CONFERENCE REPORT].

56. *Id.* (emphasis added).

national standards.⁵⁷ In passing the 1985 OPIC amendments, Congress did not "expect that developing nations immediately attain the prevailing labor standards of the United States and other highly developed countries."⁵⁸ However, Congress expects OPIC to conduct annual reviews of each country where OPIC-assisted projects are located "to ensure that progress continues to be made toward implementing worker rights."⁵⁹ OPIC is required to utilize country reports prepared by the Departments of State and Labor and submitted to Congress as mandated by section 505(c) of the Trade Act of 1974.⁶⁰

B. OPIC's Worker Rights Petition Process

OPIC is required to conduct annual public hearings to afford any person the opportunity to present views as to whether OPIC is complying with the 1985 OPIC amendments.⁶¹ The annual public hearing is also a forum for persons to present evidence of "whether any investment in a particular country should have been or should be extended insurance, reinsurance, guarantees, or financing."⁶²

This review process is open to any person and is not limited to parties that may be affected directly by OPIC's decisions.⁶³ OPIC does require that participants in the public hearing express their views through a formal challenge procedure.⁶⁴ To qualify as a formal challenge, OPIC requires complainants to support their accusations with factual information and to limit offenses to the worker rights requirements listed in Title 19, section 2462(a)(4) of the Trade Act of 1974, as amended.⁶⁵ OPIC will not entertain a complaint nor will OPIC report to Congress a particular country's practices if the complainant's challenge is unsupported by factual information or if the complainant raises issues outside the worker rights requirements outlined by the statute.⁶⁶ Several labor unions and

57. H.R. REP. NO. 285, *supra* note 17, at 6.

58. *Id.*

59. CONFERENCE REPORT, *supra* note 55, at 12, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 2583, 2585.

60. H.R. REP. NO. 285, *supra* note 17, at 6, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 2572, 2577. Section 505(c) of the Trade Act of 1974 is codified as amended at 19 U.S.C. § 2465(c) (Supp. III 1985).

61. 22 U.S.C. § 2191a(b) (1989).

62. *Id.*; H.R. REP. NO. 285, *supra* note 17, at 7, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 2572, 2578.

63. *See* 22 U.S.C. § 2191a(b) (1989).

64. 53 Fed. Reg. 39,715-16 (1988); 54 Fed. Reg. 43,871-72 (1989).

65. 53 Fed. Reg. 39,715-16 (1988); 54 Fed. Reg. 43,871-72 (1989).

66. *Id.* In the past, OPIC has avoided non-worker rights issues (e.g., discrimination based on sex or religion) in its analysis under section 291(A). *See, e.g., Hearings on H.R. 3797, supra*

human rights organizations have testified before OPIC's Board of Directors, alleging violations of worker rights and requesting that OPIC cease its activities in offending nations.⁶⁷

OPIC proposed a two-track approach to facilitate the implementation of the worker rights provision. With respect to beneficiary countries under the Generalized System of Preferences (GSP) program, OPIC will follow Executive Branch determinations of a host country's compliance.⁶⁸ Any beneficiary country "for which GSP eligibility is revoked on account of [that country's] failure to take steps to adopt and implement internationally recognized worker rights is subject concurrently to the suspension of OPIC programs."⁶⁹ For non-GSP countries in which OPIC operates, OPIC will conduct its independent analysis in consultation with the Departments of State and Labor as required by the statute.⁷⁰ Beginning with its November 1988 hearing, OPIC has agreed to provide Congress with a report concerning employment conditions in non-GSP countries which are subjects of a formal challenge.⁷¹

In February 1987 OPIC's Board of Directors notified Congress of the results of its first annual review of employment standards in countries where OPIC-assisted projects are located. OPIC indefinitely suspended insurance, reinsurance, loan guaranty, and direct loan programs to in-

note 10, at 89 (statement of Gerald West, OPIC Vice President for Development) (Mr. West testified as to OPIC's research and analysis of Saudi Arabian labor conditions.).

67. *Workers Rights in OPIC Eligible Countries: Hearings Before the OPIC Board of Directors* (Nov. 13, 1986) (Nov. 16, 1988) (Nov. 28, 1989).

68. *Oversight of the Private Sector Activities of the Overseas Private Investment Corporation: Hearing Before the Subcomm. on Int'l Econ. Pol'y and Trade of the Comm. on Foreign Affairs*, 99th Cong., 2d Sess. 13-14 (1986) [hereinafter *Oversight Hearing*], 53 Fed. Reg. 39,715-16 (1988); 54 Fed. Reg. 43,871-72 (1989) ("By prior agreement with Congress, OPIC complies with annual determinations made by the Executive Branch with respect to worker rights for countries that are eligible for the Generalized System of Preferences [GSP].") This agreement appears to conflict with congressional intent. As the Conference Report states:

The conferees expect an annual review of the worker rights situation for each country in which OPIC intends to operate, *including any country where the President has utilized his waiver authority previously*, to ensure that progress continues to be made toward implementing worker rights, and in cases where this provision has been waived, that the U.S. economic interests still warrant such a waiver in the absence of any improvement in workers' conditions.

H.R. REP. NO. 285, *supra* note 17, at 12, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 2572, 2585.

69. 54 Fed. Reg. 43,872 (1989).

70. *Id.* OPIC programs currently operate in several non-GSP countries: Anguilla, Burkina Faso, People's Republic of China, French Guiana, Gabon, Greece, Nigeria, and Saudi Arabia. See *Oversight Hearing*, *supra* note 68, at 14.

71. 53 Fed. Reg. 39,716 (1988); 54 Fed. Reg. 43,872 (1989).

vestments in Nicaragua, Paraguay, Romania, and Ethiopia.⁷² OPIC's findings with respect to Nicaragua, Paraguay, and Romania were consistent with the President's decisions under the GSP program.⁷³ With regard to Ethiopia, a non-GSP country, OPIC consulted with the Departments of State and Labor and other interested agencies prior to suspending its programs in that country.⁷⁴

In 1988 the AFL-CIO criticized OPIC's failure to discontinue programs in countries that flout internationally recognized employment standards.⁷⁵ The AFL-CIO maintained that the worker rights provisions should be a significant condition for approval of any project in any country and should not be selectively applied as "an afterthought for other political reasons."⁷⁶ OPIC officials and members of Congress recognized that the worker rights requirements were being applied inconsistently.⁷⁷ Congress noted that certain countries with poor worker rights records were eligible for OPIC-assisted projects while countries with passable conditions were withdrawn from OPIC.⁷⁸ OPIC acknowledged that this inconsistency was a result of OPIC's reliance on the Department of State and the Department of Labor's guidance.⁷⁹ In response, Congress chastised OPIC for failing to follow its legislative mandate to independently assess a country's worker rights record and suggested that OPIC make its own independent determinations to avoid applying the worker rights requirements politically.⁸⁰ This directive, however, places OPIC in a precarious position given that OPIC is under the policy guidance of the State Department.

V. IMPLICATIONS OF WORKER RIGHTS REQUIREMENTS FOR OPIC INTERNATIONAL INVESTORS AND DEVELOPING COUNTRIES

OPIC worker rights requirements raise several questions that need to be addressed by Congress. First and foremost, OPIC observed that, based on its experience, most OPIC projects adhere to higher labor stan-

72. See Letter from OPIC President Craig A. Nalen to Congressman Don Bonker (Feb. 6, 1987); see also *Hearings on H.R. 3797*, *supra* note 10, at 31.

73. *Hearings on H.R. 3797*, *supra* note 10, at 31.

74. *Id.*

75. *Id.* at 138.

76. *Id.* at 166 (statement of William J. Cunningham, Dep't of Legislation, AFL-CIO).

77. *Id.* at 82-84, 91-92.

78. *Id.* at 92.

79. *Id.* at 88.

80. *Id.* at 88-89, 92.

dards than do indigenous operations.⁸¹ Evidence demonstrates that U.S. overseas operations pay higher wages, provide safer work environments, and offer greater benefits than do local operations.⁸² Additional benefits often include subsidized meals and medical care.⁸³ It appears, therefore, that to abandon a project on the basis of a country's worker rights record is tantamount to depriving a country of a role model for labor standards. Similarly, the amendments usurp OPIC's development goals by depriving needy countries of foreign exchange, employment opportunities, and the infusion of technology.⁸⁴ "Such an amendment would have the practical effect of rendering OPIC assistance unavailable to the majority of the LDC's [lesser developed countries] which have not yet industrialized, and which do not have developed labor codes."⁸⁵

In addition, the worker rights requirements effectively preclude nonmarket economy countries from the benefits of OPIC assisted projects. Nonmarket economy countries eligible for OPIC assistance, such as the People's Republic of China and Yugoslavia, do not recognize worker rights in the same manner as the United States.⁸⁶ As a centralized socialist system, the government of the People's Republic of China is active in virtually every aspect of the economy,⁸⁷ including active participation in the representation of workers. The right of association and the right to organize and bargain collectively are either unknown or severely curtailed in nonmarket economy countries. The amendments would therefore seriously jeopardize a country such as the People's Republic of China, notwithstanding the U. S. foreign policy objective of aggressively assisting that nation's development process.⁸⁸

81. *Hearings on H.R. 3166, supra* note 37, at 254, 266.

82. *Id.*

83. *Id.* OPIC noted the Congress' failure to ratify any international labor organization convention containing the same worker rights standards set forth in the amendment. *See id.* at 253 (statement of Craig A. Nalen, Overseas Private Investment Corporation).

84. *Id.* at 253-55.

85. *Id.* at 253-54.

86. *Id.* at 253-55. As amended, section 239(f) of the Foreign Assistance Act exempts Yugoslavia and the People's Republic of China from the prohibition of OPIC assistance to communist countries. 22 U.S.C. § 2199(f) (1989). The Miscellaneous International Affairs Authorization Act of 1988 amended section 239(f) by removing Romania from the eligibility list. *Id.* The removal of Romania was made "[i]n light of the deteriorating record of Romania in the areas of human and workers rights." S. REP. NO. 500, 100th Cong., 2d Sess. 7 (1988). The Senate Committee on Foreign Relations found that foreign policy interests of the United States are no longer served by exempting Romania from the prohibition of OPIC assistance to projects located in Communist countries. *Id.*

87. *Hearings on H.R. 3166, supra* note 37, at 253-55.

88. *Id.* As part of the Omnibus Trade and Competitiveness Act of 1988, OPIC is required to report to Congress the justification for any determination it makes regarding employment conditions in the People's Republic of China. 22 U.S.C. § 2191a(a)(4) (1989). Pursuant

Furthermore, a loss of OPIC assistance as a result of a country's worker rights violations has forced a number of investors to table their proposed overseas investments. For example, when OPIC decided to cease its programs in Chile as a result of that country's labor practices,⁸⁹ almost five hundred million dollars worth of U.S. investments were abandoned by OPIC.⁹⁰ Many of these investment proposals were withdrawn.⁹¹ OPIC reported that the foregone investment opportunities were taken over by international competitors, including many from Japan, Germany, and Italy.⁹² This loss of assistance to projects in countries found to be in violation of worker rights may also have a potential negative impact on U.S. exports servicing OPIC-assisted countries.⁹³

Notwithstanding the practices of a foreign country, an exception should be created for investors who voluntarily agree to fulfill the worker rights requirements of the statute. If an investor is willing to provide its employees with recognized employment standards and is willing to work with national and international collective bargaining units, the project should not be condemned because of the host country's shortcomings. Rather than an outright prohibition of OPIC assistance to projects proposed in countries with poor worker rights records, an oversight process should be developed which ensures that U.S. investors maintain employment standards which fulfill the legislative intent. The burden should be placed on the investor to certify that its operation has adopted and implemented internationally recognized worker rights in the workplace. Through such a process, U.S. investors would become instruments of change while at the same time enabling domestic industries to expand

thereto, on April 4, 1989, OPIC reported to Congress that "while serious shortcomings continue to characterize worker rights conditions in China," that country is "taking steps to adapt and to implement internationally recognized worker rights." OVERSEAS PRIVATE INVESTMENT CORPORATION, 1989 WORKER RIGHTS DETERMINATIONS, at 38 (Apr. 1989). OPIC's report was based on the State Department's *Country Reports on Human Rights Practices for 1988*, independent research by OPIC staff, consultations with the Departments of State and Labor, and consultations with Chinese labor law experts. Letter from L. Ebersole Gaines, Executive Vice President of OPIC to Honorable Dante B. Fascell, Chairman of Committee on Foreign Affairs, U.S. House of Representatives (Apr. 4, 1989).

89. *Hearings on H.R. 3797*, *supra* note 10, at 31. The executive branch terminated Chile from the GSP program effective February 29, 1988, and OPIC subsequently followed suit. Proclamation No. 5758, 52 Fed. Reg. 49,129 (1987). In 1987 the Subcommittee on Western Hemisphere Affairs recommended an amendment to the Foreign Assistance Act of 1961 to suspend all OPIC programs in Chile as a result of Chile's failure to take steps to adopt and implement laws that extend internationally recognized worker rights. H.R. 1630, 100th Cong., 1st Sess. (1987).

90. *Hearings on H.R. 3797*, *supra* note 10, at 84.

91. *Id.*

92. *Id.*

93. *Hearings on H.R. 3166*, *supra* note 37, at 266.

into the global market. Such steps do more to advance living standards than the enactment of local labor laws that, in practice, may never be implemented. An exception for investors who voluntarily meet the worker rights requirements is a critical necessity at a time when the viability of U.S. global competitiveness is in question.

VI. A PROPOSED AMENDMENT TO THE OPIC WORKER RIGHTS REQUIREMENT

The OPIC worker rights provision should be amended to provide an exemption from the requirements when the investor is willing to voluntarily comply with the worker rights. An amendment to the OPIC worker rights requirements could read as follows:

Exemption for Voluntary Compliance With Worker Rights Requirements. The Corporation is not prohibited from providing any insurance, reinsurance, guaranty, or financing with respect to any investment in any country that fails to take steps to adopt and implement laws that extend internationally recognized worker rights, as defined in section 2462(a)(4) of Title 19, if the investor (or the sponsor of an investment project in which such investor is involved) certifies that an investment intends to implement internationally recognized worker rights, or, with respect to established operations, has implemented internationally recognized worker rights. The Corporation is authorized to establish a certification process to fulfill its obligations under this paragraph. Such certification process shall be conducted during the initial application process for new investments and shall be conducted on an annual basis thereafter. The Corporation shall also report to Congress the results of its certification process on an annual basis.

OPIC's certification process may be modeled after the procedures of the Office of Southern African Affairs (OSAA), which the Department of State developed to ensure that U.S. nationals operating in South Africa implement the fair labor principles required under the Comprehensive Anti-Apartheid Act of 1986. The OSAA requires firms to prepare a questionnaire on an annual basis setting forth, in detail and under penalty of perjury, its labor practices.⁹⁴ After reviewing the questionnaire, the OSAA determines whether a U.S. national is taking measures toward implementation of fair labor principles.⁹⁵ Although the primary concern of the Anti-Apartheid Act is the desegregation of races in the workplace

94. 22 C.F.R. § 63.1(c) (1990).

95. *Id.* § 63.3 See also FOURTH ANNUAL REPORT: SOUTH AFRICA FAIR LABOR STANDARDS FOR CALENDAR YEAR 1989 (1990) (available from the office of Southern African Affairs, Dep't of State).

in South Africa, the Act and the OSAA questionnaire process may provide guidance to OPIC's staff in formulating a certification process to satisfy the amendment suggested above.

VII. CONCLUSION

Congress prohibits the Overseas Private Investment Corporation from providing investors with political risk insurance and financial incentives for projects in countries that fail to take steps to adopt and implement internationally recognized worker rights. The worker rights requirements restrict OPIC's economic development goals by depriving lesser developed nations of employment opportunities, technology, and capital. The requirements also deprive such countries of badly needed role models for labor standards. The approach, therefore, needs to be modified. Congress should create an exception for investors who are willing to encourage worker rights in the foreign workplace rather than summarily condemn certain projects based on the practices of a foreign government. Such an exception would do more to advance the standard of living in developing countries than does the enactment of local labor laws that may never be implemented or enforced in practice.